UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAVID L. MURTISHAW, Petitioner, vs. DANIEL VASQUEZ, Warden of the California State Prison, San Quentin, Respondent.	No. CV-F-91-508-OWW-P DEATH PENALTY CASE ORDER

On January 19, 1993, the court heard the respondent's motion to dismiss Claims 2, 5, 9, 10A[1/], 10B, 19, and 20 of the first amended petition for a writ of habeas corpus based on procedural default. David Schwartz, Esq. appeared on behalf of the petitioner and Susan Bunting, Esq. appeared on behalf of the respondent. Upon due

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1. At the hearing, the respondent withdrew his motion to dismiss Claim 10A.

consideration of the written and oral arguments of the parties, the court now enters its order denying the motion as set forth therein.

DISCUSSION

I. STANDARD

It is a well-established principle of federalism that a state court decision resting on an independent and adequate foundation of state law is immune from review in the federal courts. Coleman v. Thompson, ___ U.S. ___, 111 S.Ct. 2546, 2553-54 (1991); Wainwright v. Sykes, 433 U.S. 72, 81 (1977). This principle applies "whether the state law ground is substantive or procedural." Coleman, 111 S.Ct. at 2254.

However, a state procedural bar will preclude review only if it is independent of the federal question and adequate to support the judgment. Coleman, 111 S.Ct. at 2553-54; Wainwright, 433 U.S. at 81. The mere

fact that a petitioner failed to abide by a state procedural rule does not always prevent a reviewing court from reaching the federal claim. As the United States Supreme Court determined, only a "firmly established and regularly followed state practice" may be interposed by a state to prevent subsequent review of a federal constitutional claim by a federal court. James v. Kentucky, 466 U.S. 341, 348 (1984). See also Ford v. Georgia, ___ U.S. ___, 111 S.Ct. 850, 858 (1991) (state rule announced after defendant's trial was not firmly established); Johnson v. Mississippi, 486 U.S. 578, 588-89 (1988) (procedural bar is not independent and adequate when it has not been consistently or regularly applied); Barr v. City of Columbia, 378 U.S. 146, 149 (1964) (state procedural requirements not strictly or regularly followed cannot deprive federal court's review); NAACP v.

Alabama ex rel. Flowers, 377 U.S. 288, 297 (1964) (procedural rules no bar to federal review when state courts had not applied rules with the pointless severity shown here). A procedural rule followed in a vast majority of cases is considered adequate. See Dugger v. Adams, 489 U.S. 401, 410 n. 6 (1989). A state procedural rule is not adequate, however, if it appears to be discretionary. Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992).

II. THE CLAIMS

A. Claim 2: "Ineffective Assistant of Counsel Prior To And During Petitioner's First Trial."

The petitioner presented Claim 2 in his first state habeas corpus petition and the California Supreme Court denied it on the following grounds:

> Petition for writ of habeas corpus DENIED in its entirety on grounds that it fails to allege

ineffective assistance or new evidence that undermines the confidence in the outcome. (Strickland v. Washington (1984) 466 U.S. 669, 689-91; United States v. Cronic (1984) 466 U.S. 648, 659; People v. Fosselman (1983) 33 Cal.3d 572, 581; In re Swain (1949) 34 Cal.2d 300, 304 [cert. denied, 338 U.S. 944 (1950); 340 U.S. 938 (1951); 342 U.S. 914 (1952)].) . . . All claims related to the guilt and special circumstance judgments are denied on the independent additional ground that the petition fails to justify the delay in raising them. (In re Ronald E. (1977) 19 Cal.3d 315, 321-22; People v. Jackson (1973) 10 Cal.3d 265, 268 [superseded, In re Jackson, 39 Cal.3d 464 (1985)].)

Order No. S017727 (June 20, 1991)

Thus, the California Supreme Court's decision sets forth alternate grounds for denying the petitioner's claim. The United States Supreme Court and the Ninth Circuit have recognized that a state supreme court may deny relief on the merits of a federal constitutional claim, as well as on alternate state procedural grounds. Coleman, 111 S.Ct. at 2556-66; Harris v. Reed, 489 U.S. 255, 264 n. 10 (1989); Carriger v. Lewis, 971 F.2d 329, 333 (9th Cir. 1992) (en banc), petition for cert. filed, (U.S. Jan. 12, 1993) (No. 92-7284). In such instances, however, the reviewing federal court must curtail reconsideration of the federal issue if "the state court explicitly invokes a state procedural bar rule as a separate basis for the decision. Harris, 489 U.S. at 264, n. 10.

As noted, the California Supreme Court

explicitly set forth a state procedural ground as an alternate basis for denying the petitioner's claim, namely failure to justify the delay in raising the claim. This court must respect that procedural bar if it is both independent of the federal question and adequate to support the judgment. Coleman, 111 S.Ct. at 2253-54; Wainwright, 433 U.S. at 81.

The respondent has failed to demonstrate that this rule, announced in Ronald E., 19 Cal.3d at 321-22, and Jackson, 10 Cal.3d at 268, (habeas is not a substitute for an expeditious appeal absent justification), is consistently applied. Apparently, the California Supreme Court retains discretion to deny a habeas claim that could have been raised on direct appeal, but was not. Although "justification," Jackson, 10 Cal.3d at 268, "full disclos[ure] of . . . reasons" Swain, 34 Cal.2d at 304, or "particular

circumstances," In re Stankewitz, 40 Cal.3d 391, 397, fn. 1 (1985), are required to excuse a delay, no more specific parameters appears to exist.

A discretionary state court rule cannot act as a bar to federal review. Harmon, 959 F.2d at 1461. See also Gutierrez v. Moriarty, 922 F.2d 1464, 1470 (10th Cir. 1991) (state court's unfettered discretion to waive rule means it is not consistently applied and thus not adequate), cert. denied, ___ U.S. ___, 112 S.Ct. 140 (1991). Because the California Supreme Court retains discretion in its consideration of the merits of claims that have been brought after a delay, the state procedural ground is not adequate.[2/]

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2. The inadequacy of the procedural ground relied upon by the California Supreme Court is further evidenced by the court's denial of only those claims relating to the guilt phase rather than a denial of both the guilt and penalty phase claims on that

Accordingly, the respondent's motion to dismiss Claim 2 as procedurally defaulted is denied.

B. **Claim 5: "Petitioner Was Deprived Of His Constitutional Right To Be Convicted Only By A Jury Finding Unanimously The Existence Of Each Element Of The Crime Of First Degree Premeditated Murder With Malice Aforethought And/Or Each Element Of The Crime Of Felony Murder."**

Claim 9: "The Trial Court Failed To Provide The Petitioner With Funds With Which To Retain Confidential Expert Psychiatric Consultants And Witnesses For His Defense And To Conduct A Reasonable Investigation In Preparation For His Defense."

The petitioner presented these claims in his first state habeas corpus petition and the California Supreme Court denied them on the following grounds:

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ground.

Claims that the trial court improperly denied funds for psychiatric assistance; that the guilt jury must unanimously agree on theories of first degree murder; and that the penalty jury received an erroneous unanimity instruction are denied on the independent additional ground that they were waived by failure to raise them on direct appeal. (In re Walker (1974) 10 Cal.3d 764, 773; In re Dixon (1953) 41 Cal.2d 756, 759.) All claims related to the guilt and special circumstance judgments are denied on the independent additional ground that the petition fails to justify the delay in raising them. (In re Ronald E. (1977) 19 Cal.3d 315, 321-22; People v. Jackson (1973) 10 Cal.3d 265, 268 [superseded, In re

Jackson, 39 Cal.3d 464 (1985)].)
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Walker, 10 Cal.3d 764 (1974), and Dixon, 41 Cal.2d 756 (1953), the cases relied upon by the California Supreme Court, set forth the general rule that:

> "habeas corpus cannot serve as a substitute for appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction"

Walker, 10 Cal.3d at 733 (quoting In re Dixon, 41 Cal.2d 756, 759).

As discussed above, a rule is not adequate unless it is applied in the vast majority of cases and is not discretionary. California courts have repeatedly held that

the rule that claims not raised on appeal are not cognizable on habeas "`is merely a discretionary policy governing the exercise of the reviewing court's jurisdiction to issue the writ.'" In re Wallace, 3 Cal.3d 289, 292 (1970) (quoting In re Black, 66 Cal.2d 881, 887 (1967)). See also In re Coughlin, 16 Cal.3d 52, 55 (1976) and In re Antazo, 3 Cal.3d 100, 107 (1970) (the rule that habeas corpus cannot serve as a second appeal is primarily a discretionary policy which may be overlooked where special circumstances are deemed to exist); In re Duran, 38 Cal.App.3d 632, 635 (4th Dist. 1974) (habeas corpus is not ordinarily a substitute for appeal but the court has discretion to issue the writ if it believes an appeal is not adequate or if a prompt disposition is required in the interests of justice); 6 B. E. Witkin & Norman L. Epstein, California Criminal Law § 3340 (2d

ed. 1989) ("The requirement of the exhaustion of the appellate or other remedy . . . is merely a discretionary policy governing the exercise of the reviewing court's jurisdiction to issue the writ"). Thus, the procedural ground of failure to raise a claim on appeal is not adequate to bar federal review. Moreover, as discussed supra, § II (A), the procedural ground of failure to justify delay is similarly inadequate. Accordingly, the respondent's motion to dismiss Claims 5 and 9 as procedurally defaulted is denied.

C. **Claim 10B: "Plaintiff Was Denied Effective Assistance of Counsel At His Second Penalty Trial Due To Counsel's Failure To Investigate Evidence That Petitioner Suffered From Fetal Alcohol Syndrome And/Or Had Organic Brain Damage Due To Excessive To Inhalation Of Solvents."**

Claim 19: "California's Method Of Execution Using

Asphyxiation By Caustic Cyanide Gas Constitutes Cruel and Unusual Punishment Within The Eighth Amendment To The United States Constitution."

Claim 20: "The Use Of Initiative Process In 1972 To Overturn The California Supreme Court Decision In People v. Anderson Violated The Guarantee Clause, Art. IV, Sec. 4 Of The United States Constitution, As Well As Petitioner's Rights Under The Fifth, Sixth, Eighth And Fourteenth Amendments To The United States Constitution."

The petitioner presented Claims 10B, 19, and 20 in his second state habeas corpus petition and the California Supreme Court denied them on the following alternate grounds:

> The petition for writ of habeas corpus is denied. . . . The claims involving execution by lethal gas (Ground 1); article I, section 27 of

the California Constitution (Ground 2); and failure to investigate mental defenses (Ground 8) are denied on the merits. Grounds 1, 2, and 8 are also denied for the independent reason that they are untimely. (See In re Stankewitz (1985) 40 Cal.3d 391, 396-97, fn. 1; Supreme Court Policies Regarding Cases Arising from Judgments of Death, eff. June 6, 1989, mod. eff. Sept. 28, 1989, standards 1-1 et seq.)

Order No. S026455 (Sept. 2, 1992).

Pursuant to Stankewitz, 40 Cal.3d 391 (1985): "[i]n a habeas corpus proceeding . . . the petitioner must justify any substantial delay in seeking relief. . . . Hereafter, one who seeks extraordinary relief . . . must point to particular circumstances sufficient to justify

substantia delay, as we have long required. Id. at 396 n. 1. The respondent has failed to demonstrate that the California Supreme Court has applied the timeliness rule set forth in Stankewitz in a consistent manner. In contrast, the petitioner has demonstrated that the Court does not consistently apply this rule. Therefore, the procedural ground of failure to file these claims in a timely manner is not adequate.

This conclusion is unaffected by the California Supreme Court's reliance on its policies to support the procedural bar. As set forth in Timeliness Standard 1-3, a petition that fails to comply with the timeliness requirements *may* be denied as untimely. The California Supreme Court clearly retains discretion in denying a petition for writ of habeas corpus that is not filed in accordance with the timeliness standards. As a result, the policies are

not adequate to support the California Supreme Court's decision.[3/] See Harmon, 959 F.2d at 1461.

Accordingly, the respondent's motion to dismiss Claims 10B, 19, and 20 as procedurally defaulted is denied.

CONCLUSION

IT IS ORDERED that the respondent's motion to dismiss Claims 2, 5, 9, 10B, 19, and 20 of the first amended petition for a writ of habeas corpus based on procedural default is DENIED.

IT IS FURTHER ORDERED that the petitioner shall submit, on or before March 22, 1993, a memorandum of points and authorities in support of his first amended petition for writ of habeas corpus. The

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3. The petitioner's case is one of the first cases in which the California Supreme Court relied upon the policies to support a denial of the petition on timeliness grounds.

respondent shall, within 30 days after the petitioner has filed his memorandum of points and authorities, file an answer to the first amended petition for writ of habeas corpus. The answer shall respond to all of the legal and factual assertions set forth in the first amended petition and the memorandum of points and authorities submitted in support thereof.

DATED: February 16, 1993

Oliver W. Wanger
UNITED STATES DISTRICT JUDGE